No. 15-446

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IN THE

Supreme Court of the United States

CUOZZO SPEED TECHNOLOGIES, LLC,
Petitioner,

v.

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF THE AMERICAN BANKERS ASSOCIATION, THE CLEARING HOUSE PAYMENTS COMPANY L.L.C., FINANCIAL SERVICES ROUNDTABLE, AND THE INDEPENDENT COMMUNITY BANKERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amicus The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. The ABA, whose members hold a substantial majority of domestic assets of the banking industry of the United States and are leaders in all forms of consumer financial services, often appears as amicus curiae in litigation that affects the banking industry.

The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. Amicus The Clearing House Payments Company L.L.C. owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector automated clearing house ("ACH") and wire operator in the United States, clearing and settling nearly $2 trillion in U.S. dollar payments each day, representing

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1. This brief is filed with the written consent of all parties. The petitioner has filed a blanket consent with the Court, and the government has consented by letter, filed with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

half of all commercial ACH and wire volume. Its affiliate, The Clearing House Association L.L.C., is a nonpartisan organization that engages in research, analysis, advocacy, and litigation focused on financial regulation that supports a safe, sound, and competitive banking system.

Financial Services Roundtable ("FSR") is the leading advocacy organization for America's financial services industry. With a 100-year tradition of service and accomplishment, FSR is a dynamic, forward-looking association advocating for the top financial services companies, keeping them informed on the vital policy and regulatory matters that impact their business. FSR members include the leading banking, insurance, asset management, finance and credit card companies in America. Its members are financing the American economy—creating jobs, expanding businesses, securing homes, businesses and retirement, insuring growth, and building consumer confidence.

FSR is driven at the CEO level, giving it a unique and influential voice in Washington. FSR believes a competitive, private marketplace provides the best mechanism for financing and growing the American economy. Financial services companies provide the capital, security, and the foundation needed for economic growth in both the domestic and global markets. Improving public policy governing the financial services sector is vital to ensure fair and clear rules exist that balance consumer and business needs with financial security and economic growth.

Amicus The Independent Community Bankers of America®, the nation's voice for more than 6,000

community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With 52,000 locations nationwide, community banks employ 700,000 Americans, hold $3.6 trillion in assets, $2.9 trillion in deposits, and $2.4 trillion in loans to consumers, small businesses, and the agricultural community.

The associations joining this brief, and their members, have a strong interest in the proper implementation of the America Invents Act ("AIA") post-grant proceedings, such as *inter partes* review ("IPR"). America's financial services companies rely on a strong patent system to protect their investments in innovative technologies. For many years, the financial services industry has been plagued by patent litigation based on patents that are of low quality and that should not have issued. Such patents, frequently asserted by non-practicing entities (*i.e.*, "patent trolls") seeking to extract payments based on the high cost of district court patent litigation, rather than the merits of their patent infringement case, are a major burden and a detriment to economic progress and actual innovation. The financial services industry therefore has a strong interest in ensuring that AIA post-grant proceedings, which were designed to provide a lower-cost alternative to district court litigation for determining patent validity, are effective at accomplishing that goal.

The adoption of the broadest reasonable interpretation ("BRI") standard by the United States Patent and Trademark Office ("PTO") has achieved the central goals of IPR proceedings—the availability of an expeditious

process to eliminate or narrow invalid or weak patent claims. The PTO is administering IPRs properly and effectively, and this Court should affirm the decision of the Federal Circuit in order to ensure a competitive marketplace, decrease the cost of litigation, and curb the threat of frivolous patent litigation.

SUMMARY OF ARGUMENT

Cuozzo and its amici advance arguments that fail to justify the abandonment of the BRI standard.

First, Cuozzo contends that, using the BRI standard, IPR proceedings invalidate too many patents. According to Cuozzo, 87% of IPR trials completed to date have resulted in the cancellation of one or more claims challenged. This figure is misleading. Most IPR petitions filed do not result in a completed trial because the PTO denies the petition at the institution stage or the parties reach a settlement. Of all IPR petitions that have been filed and resolved to date, only 26% have resulted in the cancellation of even a single claim. This is far fewer than the 42% of invalidity challenges that are successfully litigated in federal court. The drastic impacts that Cuozzo attributes to the BRI standard simply do not exist.

Second, district court litigation and IPRs are fundamentally different, and the same standard should not apply in both. In federal district court, a patent is presumed valid and a party challenging patent validity must prove invalidity by clear and convincing evidence. In an IPR, by contrast, there is no statutory presumption of validity, and the burden of proof is preponderance of the evidence. Further, of 2,731 completed IPR petitions,

there has been live witness testimony at a hearing only once, and videotaped cross-examinations of declarants are rarely played for the fact-finder. Moreover, in creating IPR proceedings, Congress specified that IPRs would determine whether an invention is "unpatentable," 35 U.S.C. § 311(b)—the same language used during the patent examination process and where the BRI standard is applied; by contrast, district court patent litigation determines patent "invalidity." *Id.* § 282(a). This deliberate textual choice by Congress supports the application of the BRI standard in IPRs. Finally, a patentee has the ability to amend claims in an IPR, so IPRs are more akin to patent examination than to district court litigation, where claims cannot be amended.

Third, Congress was aware that IPRs would often be conducted in parallel to district court or other proceedings when it enacted the AIA. Such parallel proceedings are not uncommon. For example, this Court has recognized that parallel proceedings involving the same parties and the same claims in state and federal courts are not improper, and whichever court's decision becomes final for *res judicata* purposes will be binding on the other court. These proceedings may apply different procedural rules and even substantive law, possibly impacting the outcomes. The existence of parallel proceedings does not support the abandonment of the BRI standard.

Fourth, the financial services industry has been particularly harmed by an ever-increasing number of frivolous lawsuits filed by the owners of low-quality patents. Congress, in enacting the AIA, created an efficient mechanism to cancel claims in low-quality patents, saving banks and other financial service providers, and ultimately

consumers, the substantial costs involved in protracted litigation. The BRI standard, as an extension of the patent examination process, is an important reason why IPRs are efficient. This Court should affirm the decision of the Federal Circuit and maintain the integrity of IPRs.

ARGUMENT

I. THE PTO CANCELS CLAIMS LESS FREQUENTLY IN APPLYING THE BRI STANDARD THAN DISTRICT COURTS INVALIDATE PATENTS USING THE *PHILLIPS* STANDARD.

In the first paragraph of the "Questions Presented" section on the first page of its brief, Cuozzo states that "inter partes review (IPR) has been both unexpectedly popular and surprisingly lethal." Pet Br. I. Cuozzo continues that, "[s]ince the inception of IPR, patent challengers have filed over 3,900 petitions, and nearly 87% of the IPR trials completed to date have resulted in the cancellation of some or all claims in the patent under review." *Id.* Thus, according to Cuozzo, the use of the BRI standard in IPRs almost always results in patent invalidation. *See, e.g., id.* ("Of course, the broader the interpretation of the claim, the more extensive the array of relevant prior art–and in turn the more likely that the claim will be held invalid in light of that prior art."). The statistics cited by Cuozzo misrepresent the true outcome of most IPR petitions and, in turn, distort the impact of the BRI standard on claim validity.

First, fewer than half of IPR petitions filed result in the institution of an IPR. As the panel majority

recognized, the PTO may institute an IPR only if the Board "determines that the information presented in the petition ... and any response ... shows that there is a reasonable likelihood that the petitioner would prevail." Pet. App. 6a (quoting 35 U.S.C. § 314(a)). Thus, a prospective petitioner is unlikely to file an IPR petition in the first place unless the petitioner reasonably believes that the petition will be successful. Nonetheless, the PTO has instituted proceedings for fewer than half of the petitions completed to date.[2] PTAB Statistics 9 (trials were *not* instituted for 1,372 of the 2,731 IPR petitions completed to date[3]). This demonstrates the difficulty in overcoming the "reasonable likelihood" threshold. A majority of the petitions for which proceedings were not instituted were denied by the PTO; the others were settled or otherwise resolved before an institution decision was made. *Id.*

When the PTO did institute an IPR, less than two thirds of those petitions resulted in a final written decision. *Id.* Just over 500 of the 1,359 petitions that reached the proceedings stage were terminated before the proceedings were completed, and 73% of those were settled by the parties. *Id.* Notably, the PTO has discretion to continue the proceeding to a final written decision on the merits even where the parties have reached a settlement and filed a joint motion to terminate. *See* 35 U.S.C. §§ 317(a),

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2. USPTO, PATENT TRIAL AND APPEAL BOARD STATISTICS 9 (Feb. 29, 2016) ("PTAB Statistics"), *available at* http://www.uspto.gov/sites/default/files/documents/2016-2-29%20PTAB.pdf.

3. "'Completed' petitions include terminations (before or after a decision on institution) due to settlement, request for adverse judgment, or dismissal; final written decisions; and decisions denying institution." PTAB Statistics 12.

327(a); *see also Blackberry Corp. v. Mobilemedia Ideas LLC*, IPR2013-00036, Paper 64, at 2 (P.T.A.B. Jan. 21, 2014). Even so, the Board has approved almost 400 post-institution settlements and many more pre-institution settlements. PTAB Statistics 9.

In summary, while Cuozzo is correct that "nearly 87% of the IPR *trials* completed to date have resulted in the cancellation of some or all claims in the patent under review," only 26% of completed IPR *petitions* have resulted in the cancellation of one or more claims. PTAB Statistics 9. That is because most IPR petitions do not result in a final written decision (what Cuozzo refers to as a "completed trial") either because the petition is denied at the institution stage or because the parties reach a settlement. Moreover, the institution rate fell by nearly 10% from fiscal year 2013 to fiscal year 2014, and fell another 10% the following fiscal year. *Id.* at 7. With fewer and fewer IPR petitions being instituted, the number of petitions leading to a final written decision is also dropping.

The PTO's patent-claim-specific data further underscore the reality of how infrequently IPR petitions lead to claim cancellation. In the 2,731 IPR petitions completed to date, the PTO instituted review of only 44% of challenged claims. PTAB Statistics 12. Further, the PTO found unpatenable just under 50% of claims for which review was instituted. *Id.* In other words, the PTO invalidated 21% of all claims challenged in completed IPR petitions. *Id.* These numbers paint a far different picture than the intended-to-alarm statistics cited by Cuozzo on the first page of its brief.

Citing the same statistics as Cuozzo, amicus Pharmaceutical Research and Manufacturers of America ("PhRMA") argues that patents deemed not invalid in district court may nevertheless be cancelled in IPR proceedings. According to PhRMA, "87% of final written [IPR] decisions find[] at least some claims unpatentable" while "invalidity challenges litigated in federal court prevail only 42% of the time." PhRMA Br. 8 (citing John R. Allison *et al.*, *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769, 1787 (2014)). As discussed above, however, only 26% of IPR petitions completed to date have resulted in the cancellation of even a single claim and only 21% of claims challenged in completed IPR petitions have been cancelled. PTAB Statistics 9, 12. The data simply do not support the conclusion that the PTO's application of the BRI standard in IPRs is more fatal to patent claims than district court invalidity challenges.[4] On the contrary, district court litigation results in claim invalidation far more frequently than do IPR proceedings.

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4. In his amicus brief, Judge Paul R. Michel, retired Chief Judge of the Federal Circuit, argues that "[m]uch of the problem with the BRI standard comes from a failure to apply it properly, and thus to unduly separate it from the *Phillips* standard for claim construction." Michel Br. 1. Judge Michel suggests that, if properly interpreted, "the distinction between *Phillips* and BRI falls away." *Id.* at 10. The BRI standard is not the same as the *Phillips* standard, and, for the reasons explained in this brief and respondent's brief, this Court should decline Judge Michel's invitation to strip all substance from the BRI standard.

II. CONGRESS INTENDED IPR PROCEEDINGS TO BE AN EXTENSION OF THE PROSECUTION PROCESS, AND IPR PROCEEDINGS ARE INHERENTLY DIFFERENT FROM DISTRICT COURT LITIGATION.

Cuozzo argues that "Congress created IPR as a substitute for district court adjudication of patent validity, not as an extension of the examination process." Pet. Br. 26. But IPRs are different in many ways from district court litigation. Moreover, the AIA's statutory language indicates that Congress intended IPRs to be an extension of the patent prosecution process. The BRI standard should therefore be applied in IPRs.

The most obvious difference between IPRs and district court proceedings is that they do not apply the same presumption of validity or the same burden of proof. In district court invalidity proceedings, the court starts with the presumption that the patent is valid. 35 U.S.C. § 282 ("[a] patent shall be presumed valid"); *see also Kahn v. Gen. Motors Corp.*, 135 F.3d 1472, 1480 (Fed. Cir. 1998) ("The presentation of evidence that was not before the examiner does not change the presumption of validity ...."). Accordingly, a defendant must prove invalidity by clear and convincing evidence. *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 91 (2011). By contrast, in an IPR, there is no statutory presumption of validity, and "the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence." 35 U.S.C. § 316(e).

Further, while the regulations refer to an IPR proceeding as "a trial," *see* 37 C.F.R. § 42.100(a), the procedures used during IPRs bear little resemblance

to the recognized attributes of a trial before a court. For instance, discovery is quite circumscribed. In IPRs, discovery is limited by statute to "the deposition of witnesses submitting affidavits or declarations" and "what is otherwise necessary in the interest of justice." 35 U.S.C. § 316(a)(5).

Another difference between an IPR and district court invalidity litigation is that, with a single exception, there has never been live witness testimony in an IPR "trial."[5] One of the judges who presided over the single IPR where a live witness was heard stated afterward "that live testimony will be a rare exception at oral arguments."[6] To date, there have been no other live witnesses in the 2,731 completed IPRs.

Where "the fact-finder has personally heard the testimony and observed the demeanor of witnesses, [reviewing courts] accord deference to the fact-finder's assessment of a witness's credibility and character." *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1180 (Fed. Cir. 1995). There is no opportunity for the judges presiding over IPRs to make such determinations. Not only are there virtually never live witnesses at IPRs, videotaped cross-examination of declarants are rarely played during IPR hearings.[7] Instead, parties submit briefs and make

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5. Brian Mahoney, *First Ever Inter Partes Live Witness Takes Stand at PTAB*, Law360.com (June 17, 2014), *available at* http://www.law360.com/articles/545409/first-ever-inter-partes-live-witness-takes-stand-at-ptab.

6. *Id.*

7. Douglas Robinson, *Deposition in Inter Partes Review Is a Different Animal*, Law360.com (Dec. 15, 2014) ("[P]roviding videotaped testimony at an [IPR] hearing is also rare ...."),

arguments citing or referring to the declarant's testimony. This is significantly different from the typical district court trial where the fact-finder hears live testimony and has an opportunity to make important credibility and character determinations.

Moreover, if the *Phillips* standard were applied in IPRs, a petitioner would likely need to proffer testimony on what a person of skill in the art would understand each claim to mean, a common feature in district courts. An evidentiary hearing would substantially burden the PTO and make it difficult or impossible for the agency to resolve each IPR petition within 12 months of the institution date, as is mandated by statute. This would undermine the efficiency of the IPR process, one of the primary goals behind its creation, and would make IPRs more like district court patent litigation, where the median time to trial is now 2.4 years.[8]

Further, the language used by Congress in the AIA supports application of the BRI standard. Congress used the terms "unpatentable" and "unpatentability" throughout the sections of the AIA that created *inter partes* review. *See, e.g.*, 35 U.S.C. §§ 311(b), 316(e). The purpose of the patent examination process is likewise to determine whether an invention is "patentable." 35 U.S.C. § 101. District courts, by contrast, determine

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available at http://www.law360.com/articles/602026/deposition-in-inter-partes-review-is-a-different-animal.

8. PricewaterhouseCoopers, *2015 Patent Litigation Study: A Change in Patentee Fortunes* 2 (May 2015), *available at* https://www.pwc.com/us/en/forensic-services/publications/assets/2015-pwc-patent-litigation-study.pdf.

patent "invalidity." 35 U.S.C. § 282(a). Congress' use of the same terminology in creating IPRs as is used in patent examination demonstrates that it viewed IPRs as closer to examination than to litigation, and it is evidence that Congress contemplated that the BRI standard should apply in IPRs.

Finally, the AIA authorizes a patentee to file, after an IPR has been instituted, "1 motion to amend the patent" to (i) "[c]ancel any challenged patent claim," and (ii) "[f]or each challenged claim, propose a reasonable number of substitute claims." 35 U.S.C. § 316(d)(1). In district court invalidity litigation, by contrast, a patentee cannot amend any claims. In presenting the opportunity for claim amendment, IPR is once again more similar to the patent examination process, where the BRI standard is applied, and less like district court litigation, where the *Phillips* standard applies.

Cuozzo argues that the "text, structure, and history of the AIA all confirm th[e] common-sense conclusion" that the same standard should be applied in IPRs and district court adjudications. Pet Br. 26. As discussed above, however, there are fundamental and undisputed differences between IPRs and district court invalidity litigation that belie Cuozzo's argument. And, as discussed, the language of the AIA supports the conclusion that Congress intended that the BRI should apply in IPR proceedings. It is therefore appropriate for the PTO to apply the BRI standard in IPRs.

III. CONGRESS CONTEMPLATED THE POSSIBILITY THAT THE PTAB AND A COURT MIGHT REACH DIFFERENT CONCLUSIONS AS TO CLAIM PATENTABILITY.

Amicus Intellectual Ventures Management LLC argues that, "[b]ecause of the difference in standards, IPR and district court litigation often result in different answer to the exact same questions." Intellectual Ventures Br. 8. To begin with, the premise of the argument—that different standards lead to a higher invalidity rate in IPRs than in district court—is simply wrong. As discussed above, *see supra* at 6-9, the data do not support the conclusion that "the brief experience already available confirms that the broadest-reasonable-interpretation standard results in broader claim constructions and higher rates of patent invalidation in IPR." Intellectual Ventures Br. 8-9.

In any event, there is nothing unique or troubling about the possibility of different results in district court and the PTAB. Indeed, there is a long history in the United States of parallel litigation in state and federal court involving the same claims and the same parties.

"Concurrent jurisdiction in two courts does not necessarily result in a conflict. When two sovereigns have concurrent *in personam* jurisdiction one court will ordinarily not interfere with or try to restrain proceedings before the other." *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (citation omitted). "Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colo. River Water*

Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (quotation marks omitted). "[P]arallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until judgment is reached in one which can be pled as res judicata in the other." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984) (citing *Colo. River Water Conservation Dist.*, 424 U.S. at 817). Given differences in state and federal procedural law, there is no certainty that the same standard of review would apply in the parallel proceedings in state and federal court.

The existence of parallel proceedings is thus well established in the law. Further, Congress was well aware of the possibility of parallel proceedings when it enacted the AIA and specifically provided for such situations in the text of the statute. *See* 35 U.S.C. § 315 (section entitled "Relation to other proceedings or actions"). The fact that the PTO might reach a different conclusion as to claim patentability than a district court does not justify the abandonment of the BRI standard.

IV. THE FINANCIAL SERVICES INDUSTRY IS SIGNIFICANTLY IMPACTED BY LOW QUALITY PATENTS AND HAS A PARTICULAR INTEREST IN MAINTAINING THE INTEGRITY OF IPR AS A MECHANISM TO CANCEL WEAK CLAIMS IN SUCH PATENTS.

Since 1998, when the Federal Circuit ruled that business methods and processes were patent eligible, *see State Street Bank & Trust Co. v. Signature Financial Group*, 149 F.3d 1368 (Fed. Cir. 1998), *abrogated in part by In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008), *aff'd*,

561 U.S. 593 (2010), the number of patent infringement cases brought against banks and other financial service providers has substantially increased.[9] "The number of campaigns, or orchestrated litigations by a single patent assertion entity against multiple banks alleging infringement of at least one common patent, increased from eight in 2008 to 14 in 2011 and 19 in 2012."[10] "The number of banks named in the lawsuits between 2008 and 2013 increased nearly 100 percent, to 127 banks."[11] Many of these lawsuits are brought by owners of "patents of dubious quality through vaguely worded demand letters or intentionally vague complaints."[12]

Thus, the financial services industry has a particular interest in the integrity of the IPR procedure. Since their creation, IPRs (as an extension of the patent examination process) have been a useful and efficient mechanism to cancel claims in low-quality patents. The BRI standard has been an essential component in the success of IPR

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9. Stephen Joyce, *New Technologies Make Banks a Magnet for Patent Trolls*, Bloomberg BNA (Sept. 16, 2015), *available at* http://www.bna.com/new-technologies-banks-n17179936102/.

10. *Id.*

11. *Id.*

12. Statement from the Am. Bankers Ass'n *et al.* to Michael C. Burgess, Chairman, Subcomm. on Commerce, Mfg. & Trade, United States House of Representatives for the Record for the Energy and Commerce Subcommittee hearing entitled "Update: Patent Demand Letter Practices and Solutions," (Feb. 25, 2015), *available at* http://www.cuna.org/Legislative-And-Regulatory-Advocacy/Legislative-Advocacy/Letters-and-Testimony/Letters/2015/02_25_15-LTR-JT-House-Energy-and-Commerce-CMT-Patent/.

proceedings as a mechanism to prevent the owners of low-quality patents from filing frivolous lawsuits against financial service providers.

The financial services industry, represented by the amici trade associations here, urges this Court to affirm the decision of the Federal Circuit and to uphold the integrity of IPR proceedings.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in respondent's brief, the decision of the court of appeals should be affirmed.

Respectfully submitted.

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